FILED
COURT OF APPEALS
DIVISION II

2017 JAN 13 PM 1:51

STATE OF WASHINGTON
BY _____
DEPUTY

NO. 48232-1-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

RIGOBERTO PUGA DE LA ROSA,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE F. MARK MCCAULEY, JUDGE

BRIEF OF RESPONDENT

KATHERINE L. SVOBODA
Prosecuting Attorney
for Grays Harbor County

BY: _____
WILLIAM A. LERAAS
Deputy Prosecuting Attorney
WSBA #15489

OFFICE AND POST OFFICE ADDRESS
County Courthouse
102 W. Broadway, Rm. 102
Montesano, Washington 98563
Telephone: (360) 249-3951

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COUNTERSTATEMENT OF THE CASE

The State essentially agrees with Respondent's recitation of the procedural facts below and the search warrant. Additionally, the State will not be seeking costs should it prevail on appeal so that portion of Appellant's argument will not be addressed.

ARGUMENT

The search warrant in this case was based upon probable cause and there was a nexus between the place to be searched (Mr. Puga De La Rosa's residence) and the thing to be seized (firearms).

1. Probable Cause.

Probable cause is established in an affidavit supporting a search warrant by setting forth facts sufficient for a reasonable person to conclude the defendant is probably involved in criminal activity. *State v. Perone*, 199 Wn.2d 538, 551, 834 P.2d 611 (1992); *State v. Maxwell*, 114 Wn.2d 761, 791 P.2d 223 (1990). "An affidavit need not establish proof of criminal activity, but *merely* probable cause to believe it *may* have occurred." *State v. Gunwall*, 106 Wn.2d 54, 73, 729)P.2d 808 (1986) (emphasis added).

The question of whether or not probable cause exists for the issuance of the search warrant should not be analyzed in a

"hypertechnical" manner. *State v. Matlock*, 27 Wn.App. 152, 616 P.2d 684 (1980). Nor must the issuing magistrate be convinced beyond a reasonable doubt that there is probable cause; there must only be a *prima facie* showing of probable cause. *State v. Osborne*, 18 Wn.App. 318, 569 P.2d 1176 (1977); *State v. Lehman*, 8 Wn.App. 408, 506 P.2d 1316 (1973).

The affidavit is evaluated in a common sense manner with doubts resolved in favor of its validity, and with great deference being accorded to the issuing judge's determination. *State v. Cord*, 103 Wn.2d 361 366, 693 P.2d 81 (1985); *State v. Partin*, 88 Wn.2d 899, 567 P.2d 1136 (1977); *State v. Freeman*, 47 Wn.App. 870, 737 P.2d 704 (1987). Affidavits of probable cause are tested by much less regular standards than those governing the admissibility of evidence at trial and the issuing magistrate is not to be confined by restrictions on the use of good common sense. *State v. Harrison*, 5 Wn.App. 454, 488 P.2d 532 (1967). Doubts as to the sufficiency of information to support probable cause must be resolved in favor of validity of the warrant. *State v. Walcott*, 72 Wn.2d 959, 435 P.2d 994 (1967).

(a) Reliability of Informant.

Under the two-part *Aguilar-Spinelli* test an affidavit must contain information sufficient to establish the informant's trustworthiness based upon the underlying circumstances and basis of his or her knowledge and must contain information that establishes the informant's veracity. *Aguilar v. Texas*, 378 U.S. 108 (1964); *Spinelli v. U.S.*, 393 U.S. 410 (1969). The affidavit is insufficient if it fails to meet either prong unless other police investigation corroborates the informant's tip. *State v. Young*, 123 Wn.2d 173, 867 P.2d 593 (1994).

(i) Basis of knowledge.

In *State v. Duncan*, 81 Wn.App. 70, 912 P.2d 1090 (1996), it was held that "[i]nformation showing the informant personally has seen the facts asserted and is passing on firsthand information satisfies the knowledge prong." *Duncan*, at 76. "Some underlying factual justification for the informant's conclusion must be revealed . . ." *State v. Cieler*, 95 Wn.2d 43, 48, 621 P.2d 1272 (1980).

(ii) Informant Veracity.

"The level of evidence necessary to establish the reliability prong of *Aguilar-Spinelli* depends on whether the informant is a

professional or citizen informant." *State v. Bauer*, 98 Wn.App. 870, 876, 991 P).2d 668 (2000). "A named citizen informant is presumptively reliable." *State v. Wible*, 113 Wn.App. 18, 24, 51 P.3d 830 (2002). Evidence of past reliability ("track record") is not strictly required where the informant is a citizen. *State v. Northness*, 20 Wn.App. 551, 556, 582 P.2d 546 (1978):

> The reliability requirement of *Aguilar-Spinelli*, retained in *State v. Jackson*, 102 Wn.2d 432, 688 P).2d 136 (1984), is generally relaxed when the informant is an ordinary citizen. *State v. Stock*, 44 Wn.App. 467, 711 P.2d 1330 (1986). Although our courts have relaxed the necessary showing of reliability for citizen informant, the informant must still supply information to support an inference that the informant is telling the truth. *State v. Huft*, 106 Wn.2d 206, 211, 720 P.2d 838 (1986).
>
> Evidence of past reliability is not required from a citizen informant, because a citizen who is an eyewitness or a victim lacks the opportunity to establish a record of previous reliability. *State v. Riley*, 34 Wn.App. 529, 533, 663 P.2d 145 (1983).
>
> ***
>
> It is only necessary for the police to interview the informant and ascertain such background facts that would support a reasonable inference that he is "prudent" or credible, and without motive to falsify.

United States v. Harris, 403 U.S. 573, 29 L.Ed.2d 723, 91 S.Ct. 2075 (1971).

State v. Berlin, 46 Wn.App. 587, 590, 591, 731 P.2d 548 (1987).

Here, there certainly is sufficient information that Ashley Young was credible. She personally witnessed the events she described to the police. CP 32-33. She is named in the affidavit. CP 32. She was able to accurately diagram the shootings scene. CP 34. It is true that Ms. Young has prior misdemeanor convictions for dishonesty, theft in the third degree, and making a false statement, that were not included in the search warrant affidavit (see declaration of Jon Hudson). Although she did not make a statement against her penal interest, she told the police she "was really scared and very apprehensive about her safety if it was found out that she spoke to police about this incident." CP 35.

(b) Scope of Warrant.

Officers can lawfully seize obvious contraband discovered while searching with a scope of a valid warrant. *State v. Helmka*, 86 Wn.2d 91, 92, 542 P.2d 115 (1975). In *Helmka* the magistrate issued a warrant to search for marijuana. During the course of the search the officers found and seized amphetamines. This seizure was upheld by the Supreme Court. There is no evidence that the officer searched where the items named in

the warrant were unlikely to be found (e.g. searching for a large power tool in a small jewelry box). The search warrant permitted officers to search for "[a]ny and all firearms . . ." CP 22. All the items seized in this case were either named in the warrant or were obvious contraband.

(c) Nexus

"Probable cause requires a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched." *State v. Goble*, 88 Wn.App. 503, 509, 945 P.2d 263 (1997). The existence of probable cause is evaluated on a case by case basis. *Helmka* at 93. General rules must be applied to specific factual situations. *Helmka* at 93. In each case, "the facts stated, the inferences to be drawn, and the specificity required must fall within the ambit of reasonableness." *State v. Thein*, 138 Wn.2d 133, 149, 977 P.2d 582 (1999). Where things of continuing utility, such as weapons or clothing, are used in the commission of a crime it is reasonable to infer that those items will be found at the defendant's residence:

> We do not find it unreasonable to infer these items were in the possession of the defendant at his home. These were personal items of continuing utility and were not inherently incriminating. Under specific circumstances it may be reasonable to infer such items will likely be kept where the person lives. See *Wayne R. Lafave*, Search

> and Seizure, section 3.7(d)(at 31-85) 3d Ed. (1996). ("Where the object of the search is a weapon used in the [commission of a] crime or clothing worn at the time of the crime, the inference that the items are at the offender's residence is especially compelling, at least in those cases where the perpetrator is unaware that the victim has been able to identify him to police.") See also *State v. Condon*, 72 Wn.App. 638, 644, 865 P.2d. 521 (1993).

Thein at 149, footnote 4

State v. Condon, 72 Wn.App. 638, 865 P.2d 521 (1993) was a murder case. Condon was a hired hand on a ranch in Snohomish County and entered into a romantic relationship with the decedent's wife. At some point the decedent failed to return home and was reported missing by his mother. Earlier, the decedent's wife had found blood and bone fragments by the front porch. Detectives also discovered a shotgun casing on the ground. Behind the house the officers discovered the decedent's body underneath a wheelbarrow. The body had shotgun wounds to the head and chest.

Police obtained a search warrant to search Condon's residence. Officers found a shotgun and a number of 12 gauge shotgun shells. Among other issues, Condon argued that the affidavit did not contain sufficient facts establishing a nexus that the items described in the warrant

would be found at his residence opposed to somewhere else. The Court of Appeals disagreed:

> As the State points out, however, many jurisdictions hold that when the object of a search is a weapon used to commit a crime, it is reasonable to infer that the weapon is located at the perpetrator's residence, especially in cases where the perpetrator is unaware that police have connected him or her to the crime. Thus, because it is reasonable to infer that the weapon used to commit a crime may be found at the perpetrator's residence, the fact that the affidavit did not specify why items should be found in Condon's residence, as opposed to anywhere else, does not render it insufficient.

Condon at 644 (citations omitted).

There is no evidence in the record that the appellant knew that he had been named as the possible shooter. The appellant had ample opportunity to submit such evidence in the form of affidavits or other evidence and failed to do so. This court should decline the invitation to speculate as to this issue. Brief of Appellant at 10.

Based on the case law, it was reasonable to infer that the gun would be at his residence, the address of which was confirmed. CP 36. Appellant claims that the trial court disregarded *Thein* and relied on *Condon* and failed to consider the appellant's "likely awareness that the

police connected him to the shooting." Brief of Appellant at 10. Once again, there is no evidence in the record that the Appellant knew that he was a suspect even though he had ample opportunity to present such evidence. Both *Thein* and *Condon* recognized that when the object of a search is a weapon used to commit a crime it is reasonable to infer that the weapon will be in the suspect's residence. *Condon* at 644; *Thein* at 149, footnote 4 (referencing *Condon).*

CONCLUSION

For all the foregoing reasons, the appellant's conviction should be affirmed and this appeal dismissed.

DATED this 12 day of January, 2017.

Respectfully Submitted,

By: _____
WILLIAM A. LERAAS
Deputy Prosecuting Attorney
WSBA #15489

WAL/lh

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STATE OF WASHINGTON, Respondent, v. RIGOBERTO PUGA DE LA ROSA. Appellant.	No.: 48232-1-II **DECLARATION OF MAILING**

DECLARATION

I, Sarah Wisdom, hereby declare as follows:

On the 12th day of January, 2017, I mailed a copy of the Brief of Respondent to Lisa E. Tabbut, Attorney at Law, PO Box 1319, Winthrop, WA 98862 by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 12th day of January, 2017, in Montesano, Washington.

Sarah L Wisdom

PROSECUTING ATTORNEY
GRAYS HARBOR COUNTY COURTHOUSE
102 WEST BROADWAY, ROOM 102
MONTESANO, WA 98563
(360) 249-3951 FAX 249-6064